MICHAEL FAILLACE & ASSOCIATES, P.C.
Michael A. Faillace [MF-8436]
60 East 42nd Street, Suite 2020
New York, New York 10165
Telephone: (212) 317-1200
Facsimile: (212)317-1620
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ENRIQUE SALINAS , ALFREDO RODRIGUEZ,ANGEL CEDENO, CHRISTIAN URGILES,FRANCISCO LUGO, JOSE AMEZQUITA, LUIS ROBALLO, MIGUEL CERVANTES, NAHUN FLORES, PABLO ALVARADO, PABLO FRANCISCO-LOPEZ, VALENTIN XOCHIPILTECATL and VICENTE LEON, individually and on behalf of others similarly situated,

Plaintiffs,

-against-

STARJEM RESTAURANT CORP (d/b/a FRESCO BY SCOTTO) MARION SCOTTO and ANTHONY SCOTTO,

Defendants.

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Index No. 13-cv-2992 (AT)

DECLARATION OF DAVID M. BRESHEARS CPA/CFF

I. Assignment

1. I have been retained by counsel for the named plaintiffs and others similarly situated ("Plaintiffs") in the matter of Enrique Salinas, Alfredo Rodriguez, Angel Cedeno, Christian Urgiles, Francisco Lugo, Jose Amezquita, Luis Roballo, Miguel Cervantes, Nahun Flores, Pablo Alvarado, Pablo Francisco-Lopez, Valentin Xochipiltecatl, and Vicente Leon v. Starjem Restaurant Corp (d/b/a Fresco By Scotto), Marion Scotto, and Anthony Scotto ("Defendants"). Plaintiffs, as current and former employees of the restaurant Fresco by Scotto, have alleged that Defendants improperly took a tip credit against Plaintiffs' wages, failed to pay Plaintiffs for all hours worked, failed to provide Plaintiffs written notices and wage statements compliant with New York Labor Laws ("NYLL"), wrongly required Plaintiffs to cover the costs of uniforms and crumbers, and failed to pay Plaintiffs the "spread of hours" premium mandated by the New York Commissioner of Labor's Minimum Wage Order.[1] An Opinion and Order dated August 12, 2015 was issued by Hon. Analisa Torres on the matter ("Opinion"), and I have been asked to calculate the potential damages and liquidated damages resulting from the holdings in the Opinion.

II. Summary of Expert Qualifications

2. I am a certified Public Accountant, licensed in the State of California, and Certified in Financial Forensics. I am currently a partner at Hemming Morse, LLP, CPAs, Forensic and Financial Consultants. My work in the accounting profession includes experience as an auditor and as a consultant. My expert qualifications, including my testimony, are described in Exhibit A hereto.

[1] Opinion and Order dated August 12, 2015 issued by Hon. Analisa Torres ("Opinion"), pp 1.

3. I have consulted on and/or testified in over 120 matters involving wage and hour-related disputes, including those arising under Fair Labor Standards Act ("FLSA"). These matters have involved allegations of unpaid overtime, off-the-clock work, meal and rest break violations, employment misclassification, time shaving, and record keeping violations.

4. My firm has been compensated for my review and analysis in this matter at my standard hourly rate of $440 per hour. Others have assisted me in my work and my firm has been compensated for their work at their standard hourly rates.

III. Summary of Opinions

5. Based on my analysis, I have determined potential damages to be $495,633. The allocation of damages by Plaintiff is detailed below in Table 1:

Table 1[2]

Name	Wage & Tip Damages	Wage Notice & Statement Penalties	FLSA Liquidated Damages	NYLL Liquidated Damages	Total Damages
Alfredo Rodriguez	$ 11,801	$ 5,000	$ 9,136	$ 11,603	$ 37,540
Angel Cedeno	8,202	5,000	5,880	8,020	27,102
Christian Urgiles	16,379	4,900	3,658	6,095	31,032
Enrique Salinas	39,545	5,000	10,336	15,049	69,930
Francisco Lugo	7,449	3,950	5,829	6,936	24,164
Jose Amezquita	2,722	3,500	2,717	2,722	11,660
Luis Roballo	21,142	5,000	8,072	10,739	44,952
Nahun Flores	30,411	5,000	8,294	13,574	57,280
Miguel Caravantes	23,680	5,000	5,789	10,016	44,485
Pablo Alvarado	22,316	5,000	3,976	8,427	39,719
Pablo Francisco-Lopez	18,781	4,200	3,160	5,354	31,495
Vicente Leon	35,823	5,000	10,841	15,865	67,529
Valentin Xochipiltecatl	6,806	-	591	1,349	8,745
Total	$245,056	$ 56,550	$ 78,279	$ 115,749	**$ 495,633**

[2] Exhibit 1. The spreadsheets containing my calculations are annexed hereto as Exhibits 1-15, as cited herein. An electronic file containing those spreadsheets is also being provided herewith.

IV. Evidence Considered

6. In undertaking my assignment, I have considered information from a variety of sources, each of which is of a type that is reasonably relied upon by experts in my field. Those sources are identified throughout this report, as well as in Exhibit B to this report.

7. I have been provided with documents which can generally be described as one of the following: (a) payout worksheets, which provide, by shift, employee positions and the corresponding tip allocations, (b) "punch sheets" or timesheets, and (c) weekly payroll records.

V. Basis of Opinions

8. I have used the weekly payroll records as the starting point for my calculation. These records show, among other items: (a) employee name and last four digits of their social security number; (b) weekly pay period dates; (c) number of hours worked; (d) wage rate; (e) tips paid; and (f) gross earnings. I determined, for each Plaintiff, the number of hours that should have been paid during the weekly pay periods. This was done by adding: (a) the hours paid on the weekly payroll records and (b) the undercounted hours, as discussed below in paragraphs 11, 13 and 14. To determine the wages that Plaintiffs should have received, I then multiplied the hours that should have been paid by the wage rate that Plaintiffs should have received. I also calculated the tips that Plaintiffs should have received, as described below in paragraph 20. I then compared the wages and tips that Plaintiffs should have received to the gross earnings paid on the weekly payroll records to determine any damages. [3]

[3] Exhibit 2.

9. In addition to unpaid wages and misallocated tips, I also calculated damages by assessing a penalty when Defendants failed to provide adequate written wage notices and wage statements, as discussed below in paragraphs 21 and 22.

Undercompensated work prior to June 26, 2011

10. Prior to June 26, 2011 the actual hours Plaintiffs worked were not tracked, rather Plaintiffs were paid a set number of hours for each shift worked.[4] The Opinion found that Plaintiffs were underpaid for the number of hours worked as outlined in Table 2, below:

Table 2 [5]

Beginning Date	End Date	Employee Position	Day of Week	Shift	Undercounted Hours
1/1/2007	11/8/2008	Busser	Saturday	PM	1
11/10/2008	1/10/2009	Busser	Weekday	PM	1
11/10/2008	1/10/2009	Busser	Saturday	PM	2
1/12/2009	12/4/2010	Busser	Weekday	PM	2
1/12/2009	12/4/2010	Busser	Saturday	PM	3
1/12/2009	12/4/2010	Runner	Saturday	PM	1
1/12/2009	12/4/2010	Runner	Weekday	PM	1
12/6/2010	6/25/2011	Busser	Weekday	PM	1
12/6/2010	6/25/2011	Busser	Saturday	PM	2

11. If Plaintiffs worked a shift prior to June 26, 2011, as evidenced by them being allocated tips on the payout worksheet, I added the applicable number of hours from Table 2, above, to the undercounted hours.[6] I then added the undercounted hours to the hours paid on the weekly payroll records as part of recalculating the wages Plaintiffs should have received.[7]

[4] Opinion pp 17.
[5] Opinion pp 43-44.
[6] Exhibit 7.
[7] Exhibit 2.

Undercompensated work from June 26, 2011 and forward

12. On June 26, 2011, a punch-in-punch-out time clock system was implemented by Defendants for tracking the hours worked by their employees.[8]

13. The Opinion found that as of July 1, 2011, if Plaintiffs punched in after 10:41 AM for a lunch (AM) shift or after 4:41PM for a dinner (PM) shift, then the total hours recorded for that shift, and therefore the total hours paid for that shift, were undercounted by 19 minutes.[9] Based on the clock in times listed on the timesheets, I added 19 minutes to the undercounted hours in accordance with that finding.[10] [11] However if the total hours listed on the timesheet was an accurate reflection of the clock in and clock out times, I assumed no undercounting of hours for that shift. I then added the undercounted hours to the hours paid on the weekly payroll records as part of recalculating the wages Plaintiffs should have received.[12]

Spread of Hours Premium

14. Defendants and Plaintiffs stipulated at the December 4, 2014 pre-trial hearing that Plaintiffs had not received the "spread of hours" premium prior to February, 2011.[13] Therefore, counsel has instructed me to include in the undercounted hours a one-hour premium for any double shift Plaintiffs worked prior to February, 2011. Based on the payout worksheets, for each instance Plaintiffs were allocated tips for both the lunch (AM) and dinner (PM) shifts, I added one hour of additional pay to Plaintiffs

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[8] Opinion pp 19.
[9] Opinion pp 45.
[10] Exhibit 5.
[11] The timesheets did not indicate which shifts the hours worked were for. Therefore, I assumed that if clock out time was after 6:00 AM and before 4:30 PM, the shift was a lunch (AM) shift. Otherwise, if clock out was past 4:30 PM, the shift was assumed to be a dinner (PM) shift.
[12] Exhibit 2.
[13] Opinion pp 2.

undercounted hours.[14] I then added the undercounted hours to the hours paid on the weekly payroll records as part of recalculating the wages Plaintiffs should have received.[15]

Wage Rates

15. The Opinion found that prior to July 2012, Plaintiffs were not properly notified of the tip credit wage. Counsel has informed me that therefore, prior to July 2012, Plaintiffs should have been paid at the applicable minimum wage.[16] Prior to July 2012, I calculated the wages Plaintiffs should have received by multiplying the applicable minimum wage by the hours Plaintiffs should have been paid for, as discussed above in paragraph 8. I am informed by counsel that FLSA and NYLL provides that employees should receive one and one-half times their wage rate for hours worked over 40 in a work week. Therefore, to calculate the overtime premium Plaintiffs should have received, I multiplied: (a) any hours worked over 40 in a work week; by (b) the applicable wage multiplied; by (c) one-half (0.5).[17]

16. The Opinion found that as of July 2012, shifts where bussers and runners spent a substantial amount of their time performing non-tipped work should not have been subject to the tip credit. Rather those hours should have been paid at the applicable minimum wage.[18] I reviewed the timesheets and determined, based on the employee position and total hours of the shift, which shifts should have been paid at minimum wage and which should have been subject to the tip credit wage.[19] [20] I then multiplied the

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[14] Exhibit 9.
[15] Exhibit 2.
[16] Opinion pp 32-34.
[17] Exhibit 2.
[18] Opinion pp 40-42.
[19] Opinion pp 41 explains that bussers who worked a shift shorter than 6 hours 40 minutes, runners

hours subject to minimum wage by the applicable minimum wage and the hours subject to the tip credit wage by $5.00, as instructed by counsel. Where Plaintiffs worked over 40 hours in a work week at both minimum wage and the tip credit wage, I multiplied: (a) any hours over 40; by (b) the weighted average wage rate; by (c) one half (.5) to calculate the overtime premiums owed to Plaintiffs. The weighted average rate was calculated by multiplying (a) the number of hours worked at minimum wage, by (b) minimum wage, and adding to that (c) the number of hours worked at the tip credit wage multiplied by (d) the tip credit wage. I then divided that sum by the total number of hours worked to reach the weighted average rate.[21]

Misallocated Tips

17. During a shift, all of the tips received from customers were captured in a tip-pool. A point-based system was then used to distribute the total tips to the bussers, barbacks, stockers, coffee preparer, runners, waiters and floor captain who had worked during the shift.[22] I understand this allocation was done for every shift on the payout worksheets, and I used these payout worksheets as the basis for determining misallocated tips. The payout worksheet lists, among other items: (a) date; (b) shift (AM or PM); (c) total tips; (d) total points; (e) employee position and name; (f) party captain name and points; (g) floor captain name; and (h) tip allocation per position.

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who worked a lunch shift shorter than 5 hours 50 minutes, and runners who worked a dinner shift shorter than five hours 5 minutes should have received minimum wage for those shifts.

[20] Exhibit 5.

[21] Exhibit 2.

[22] Opinion pp 21.

18. The Opinion found that tips from the tip-pool were improperly allocated to non-service employees. The positions that should not have received tips from the tip-pool were the coffee preparers when a coffee helper was working, and stockers.[23]

19. The Opinion found that tips were also improperly allocated to managers. Artillio Vosilla ("Vosilla") was deemed a manager and should not have received tips from the tip-pool during January through June 2011.[24] [25] From October 2007 through December 2012, Brent Drill ("Drill") was found to be a manager and should not have received tips from the tip-pool.[26]

20. To determine what the proper allocation of tips should have been for each shift, I first determined the correct points that the tip-pool should have been allocated amongst. For shifts from October 2007-December 2012, if "Brent" was listed as the floor captain on the payout worksheet, I deducted the points allocated to that position from the total points listed. [27] I then determined any tips that were paid to those employees, listed in paragraphs 18 and 19 above, who should not have received tips. These amounts were added to the total tips to be allocated, which effectively reallocated those tips across the employees who should have received the tips. I then divided the adjusted total tips by the adjusted total points to determine the value of 1 point. I then multiplied each position's point allocation by the value of one point to determine what the proper tip allocation

[23] Opinion pp 36-37.
[24] Opinion pp 40.
[25] From January through June 2011, if tips were allocated to the party captain position but no name was listed for that position, or "Yes" was listed for that position, I have assumed Vosilla was the party captain for that shift.
[26] Opinion pp 37.
[27] When the total points were not clearly listed on the Payout Worksheet, the total points were calculated by dividing the total tips by tips allocated for one point. The allocation of tips for one point were calculated by dividing the tips allocated to runners by .75, since that position was allocated .75 points. See Exhibit 13.

should have been for each position during each shift. I compared the proper tip allocation to the actual tip allocation and recorded any difference.[28] For each Plaintiff, the total underpayment of tips due to inappropriate allocation was then added to the weekly payroll records as part of recalculating the pay Plaintiffs should have received.[29]

Penalties

21. The Opinion found that from April 9, 2011 through June 30, 2012, Defendants failed to provide Plaintiffs with proper written wage notices pursuant to NYLL § 195(1).[30] As a result, I have been informed by counsel that Plaintiffs are entitled to penalties for inadequate wage notices at $50 per work week, up to a total of $2,500 per Plaintiff.[31]

22. The Opinion found that from April 9, 2011 forward, Defendants failed to provide Plaintiffs with wage statements containing the proper information pursuant to NYLL § 195(3).[32] As a result, I have been informed by counsel that Plaintiffs are entitled to penalties for inaccurate wage statements at $100 per work week, up to a total of $2,500 per Plaintiff.[33]

Uniforms and Crumbers

23. I have not calculated damages related to Defendants requiring Plaintiffs to purchase uniforms and crumbers from Defendants without reimbursement.[34] I understand that counsel is including this calculation in his submission.

[28] Exhibit 7.
[29] Exhibit 2.
[30] Opinion pp 46.
[31] Exhibit 2.
[32] Opinion pp 47.
[33] Exhibit 2.
[34] Opinion pp 48-50.

Liquidated Damages under FLSA[35]

24. I was informed by counsel that the damages related to the misallocation of tips to managers and the spread of hours premium should not be included in calculating the liquidated damages under FLSA, as these were violations of NYLL but not FLSA.[36] Therefore in calculating liquidated damages under FLSA, I have excluded the damages related to misallocated tips to managers and the spread of hours premiums. Counsel has also instructed me to exclude from FLSA liquidated damages the penalties assessed for Defendants failing to provide the proper written wage notices and the proper wage statements.

25. The Opinion found that Defendants willfully violated the FLSA by failing to compensate Plaintiffs for all hours worked prior to June 26, 2011.[37] Counsel has informed me that therefore, these damages are subject to the FLSA three year statute of limitations. I have calculated liquidated damages for the three years preceding May 3, 2013, the date the complaint was filed by Plaintiffs in this matter. I calculated liquidated damages subject to the three year statute of limitations to reflect only the willful violation of failing to pay all hours worked. To do so, counsel informed me to calculate those hours that were willfully underpaid and multiply them by the wage rates Plaintiffs had been paid on the weekly payroll records for the applicable work week. If the sum of: (a) the hours recorded on the weekly payroll records and (b) the underpaid hours exceeded 40 hours, I calculated an overtime premium by multiplying the hours exceeding 40 by one-half (0.5) the rate that the Plaintiffs had earned on the weekly payroll records.

[35] Exhibit 3.
[36] Opinion pp 37.
[37] Opinion pp 51.

26. The Opinion found that all damages apart from Defendants failing to compensate Plaintiffs for all hours worked were not willful violations of FLSA. Counsel has informed me that therefore, all recoverable damages[38] are subject to the FLSA two year statute of limitations. I have calculated liquidated damages on all recoverable damages,[39] for the two years preceding May 3, 2013, the date the complaint was filed by Plaintiffs in this matter.

Liquidated Damages under NYLL[40]

27. Counsel has instructed me to exclude from the NYLL liquidated damages calculation the penalties assessed for Defendants failing to provide the proper written wage notices and the proper wage statements.

28. I am informed by counsel that prior to November 24, 2009, under NYLL, liquidated damages applied only to willful violations of NYLL. Therefore, prior to November 24, 2009, I have calculated liquidated damages as those resulting from Defendants failing to compensate Plaintiffs for all hours worked prior to June 26, 2011, as it was found this was a willful violation.[41] I have been asked by counsel to calculate those hours that were willfully underpaid and multiply them by the wages Plaintiffs had been paid on the weekly payroll records for the applicable work week. If the sum of: (a) the hours recorded on the weekly payroll records and (b) the underpaid hours exceeded 40 hours, I calculated an overtime premium by multiplying the hours exceeding 40 by one-half (0.5) the rate that the Plaintiffs had earned on the weekly payroll records.

[38] With the exceptions noted in Paragraph 23.
[39] With the exceptions noted in Paragraph 23.
[40] Exhibit 4.
[41] Opinion pp 51.

29. From November 24, 2009 forward, I have considered all recoverable damages[42] to be subject to liquidated damages, because I am informed by counsel that the standard for recovering liquidated damages under the NYLL from that date was changed from willfulness to a standard requiring the Defendants to establishing a good faith basis for believing their actions did not violate the law.

30. I am also informed by counsel that prior to April 9, 2011, liquidated damages were calculated as 25% of recoverable damages. Beginning April 9, 2011, liquidated damages are calculated as 100% of recoverable damages. I have used these percentages accordingly when calculating liquidated damages under NYLL.

Alternate Liquidated Damages Calculation

31. I have been asked by counsel to calculate an alternative damage model which assumes Plaintiffs cannot recover liquidated damages under both FLSA and NYLL. Under this alternative calculation, I have assumed Plaintiffs will receive liquidated damages under NYLL only, which results in total damages of $417,354 ($495,633-$78,279).[43]

I declare under penalty of perjury that the foregoing is true and correct.

[signature]

David Breshears, CPA/CFF
January 29, 2016

[42] With the exception noted in Paragraph 26.
[43] Exhibit 1.